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**SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL CONSULTATION "ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DEVELOPMENT ACTIVITIES OF INTERNATIONAL INSTITUTIONS" ORGANIZED IN COOPERATION WITH THE HIGH COUNCIL FOR INTERNATIONAL COOPERATION (FRANCE)**

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# The citizen and the State: the duty to ensure the primacy of human rights in any international negotiation

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1. At the United Nations World Conference on Human Rights in Vienna in 1993, 171 States declared that the protection and promotion of human rights were the first responsibility of Governments. This commitment was strongly supported by the NGO conference, which was being held simultaneously in conjunction with the United Nations Conference. The United Nations bodies have on many occasions recalled that commitment and, on 26 November 1999, the Committee on Economic, Social and Cultural Rights adopted an important declaration, reminding all States as well as the World Trade Organization (WTO), whose third ministerial conference was about to open a few days later in Seattle, of that commitment.

2. How can one be sure that States will effectively fulfil their commitments in this respect? How can one be sure that the States members of WTO, in the course of negotiations conducted under the aegis of that organization, will not forget the commitments to which most of them have subscribed as members of the United Nations? What can citizens do, individually or through their civil, trade union and political organizations, to improve the transparency of those negotiations and to strengthen the central role of protecting and promoting human rights in international relations?

## I. THE OBJECTIVES OF WORLD TRADE

3. For the last three centuries, the growing power of merchants has been acquired through State institutions. It might even be said that their power has been acquired thanks to a policy of reliance on those institutions. The legislative and regulatory instruments of public authority were used most effectively by the bourgeoisie, especially at the time of the "bourgeois revolutions", starting with the French Revolution. A good example was its "law on the freedom of trade and industry", one of the main tenets of which was a ban of workers' associations.

4. Two converging trends occurred in the nineteenth and first half of the twentieth centuries:

- On the one hand, the State became increasingly concerned with the economic and social aspects of relations between citizens;

- On the other hand, the bourgeoisie, industrialists and financial institutions increasingly used their influence within the State to push through laws and regulations that served their interests.

5. Fortunately, this trend did not go unopposed by social movements and activists. But at no time was the initial founding pattern ever challenged. The State basically served the dominant interests in exercising the prerogatives of public authority and those interests were chiefly those of the bourgeoisie, industry and business. Then in 1994, a trick of magic was played in Marrakesh. There 132 countries had met to end one of the GATT negotiating "rounds", the "Uruguay-round". Those 132 countries went into the conference room under the "GATT" umbrella and came out wearing the colours of WTO, a trade body which was completely independent of the United Nations, although it had been the United Nations which had taken the initiative years earlier of launching an international trade organization. How was it

that in the agreement instituting the World Trade Organization, the United Nations was left aside, forgotten? How can the World Trade Organization claim to have nothing to do with the United Nations system?

In practical terms, this means that the World Trade Organization feels bound neither by the United Nations Charter, nor by the International Covenant on Economic, Social and Cultural Rights, nor by the Charter of Economic Rights and Duties of States, even though the organization is made up almost entirely of countries that are members of the United Nations and which as such are bound by those instruments.

6. In the Marrakesh agreement, no mention is made of "human rights" (except incidentally). On the other hand, the preamble refers to notions which were obviously arrived at through negotiation, such as "raising standards of living", "ensuring full employment", "a large and steadily growing volume of real income", or "effective demand and expanding the production of and trade in goods and services". Human Rights seem to take second place to the aim of expanding production and trade. Moreover, the WTO Agreement states in its preamble that it is resolved: "to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the result of past trade liberalization trade efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations". This means that, unlike what is often believed, WTO was not a sequel to GATT; it encompasses GATT, but extends well beyond it, establishing an institutional framework that covers an impressive list of agreements.

7. Clearly the transnationals are trying to tout their ultra-liberal approach in all forums that are unrelated to the United Nations system: a very revealing sign of this was the toing and froing of the famous draft Multilateral Agreement on Investment from WTO to OECD and back to WTO. Yet the general economic system introduced with such schemes amounts to a formidable attack on economic development systems based on public service and the protection of the most underprivileged. It is the least developed countries and the most deprived citizens in all countries which have most to lose from the introduction of an uncontrolled competitive system. But the transnationals soon tried to go even further.

8. The creation of the World Trade Organization was a first significant step. There is much discussion nowadays as to whether the WTO should be considered as belonging to the United Nations system or not. There is no doubt that the answer should be yes, since WTO succeeded GATT, which was itself part of the United Nations system. But what is interesting is not the answer, nor even the question itself: what is revealing is why the question is ever asked in the first place. It is equivalent to asking whether WTO is or is not bound by all the United Nations instruments, such as its Charter, the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights and the Charter of Economic Rights and Duties of States.

9. In order to appreciate the significance of the issues at stake, it may be worth recalling some of the rules adopted by the Community of States which hamper the transnationals' move towards an increasingly liberal legal system:

The 1974 Charter of Economic Rights and Duties of States stipulates that: "Each State has the right ... to regulate and exercise authority over foreign investment ...".

The 1966 International Covenant on Economic, Social and Cultural Rights provides in article 2 that: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

10. The Covenant further provides in article 1 that "All peoples ... freely dispose of their natural wealth and resources". It also recognizes a substantial number of fundamental rights (a copy is included in the seminar file). These rights represent not only areas of freedom but also a lever that citizens can use to act on their living conditions and on their environment.

11. On the other hand, the question of how far these international instruments are applicable and how effective each one is remains moot and controversial. Clearly the ultra-liberals like to say that the instruments are not all applicable in practice; but even if they are, they prefer to take the view that the WTO, which according to them does not belong to the United Nations system, is not bound by them. What is new here is the way the transnationals are acting and the way the public authorities are letting them do what they want. Their goal now is clearly to cast off altogether the straightjacket of rules accepted by States and international organizations. Their preferred method is often through lobbying, a visible sign of which is the closeness of relations between transnationals and political leaders (a good example being the Davos meetings).

12. The consequence has been admirably summed up by an expert with the American Senate, Jeffrey Schott (quoted by Janette Habel in le Monde Diplomatique of October 2000). Mr. Schott explains that free trade implies unequal obligations, which are a greater burden for developing countries than for their industrialized country partners, but that this inequality is offset by the fact that it makes a developing country more attractive for foreign investors. In other words, you may be dying of hunger, but you will have the satisfaction of knowing that foreign investors are happy.

## II. THE DANGER THAT STATES MAY RELINQUISH THEIR PROTECTIVE DUTIES AND PREROGATIVES

13. Nowadays transnationals are resorting to ideological arguments and methods to pressure politicians in the direction they want to go, that is, towards a dismantling of state functions. We are constantly being inundated with statements about the fantastic benefits of liberalism, of the open capitalist economy, privatization, etc. This type of argument is intended to convince both the public and political leaders that ultra-liberalization is the right choice (how often have we been told that total liberalization creates employment, a statement that is clearly easier to repeat than to substantiate!).

14. In this new phase, the transnationals are trying not only to change the legislative and regulatory scene to suit themselves; they are also seeking simply to do away with every kind of regulation in order to operate free of any control by the State or by a public authority. No doubt

the transnationals are aware that "the State remains the least objectionable source of justice and solidarity, two principles which in the longer term are all that can justify the trend towards globalization" (François Crepeau and others: "Mondialisation des échanges et fonctions de l'Etat". Editions Bruylant-Brussels). It is a known fact that public opinion was kept in the dark where the negotiations for the Multilateral Agreement on Investment (MAI) were concerned, but one suspects the matter was by no means clear even for the Governments that were supposed to be negotiating.

15. In other words, the retrenchment of Governments like France and the United States may not be the triumph of public opinion or to the latter's pressure. There is every indication that the negotiators appointed by the Governments (generally senior officials of the economic ministries) had moved out on a limb without their Governments knowing just how far they had gone and without the Governments appreciating all the implications of the instruments which had been negotiated. If that is true, it would point to another fact. Not only do the transnationals wish to obtain a gradual relinquishment of sovereignty by the States, but they wield so much influence that in treaty negotiations the negotiators in fact give in to their wishes and consent to this loss of sovereignty.

16. The plans currently under discussion concerning trade, financial exchanges and investment amount to concerted attacks on all the prerogatives of public authority in many crucial areas such as the economy, social protection, the environment or access to culture. The underlying goal is to dismantle the scope of public authority (including the aspect of public services) for the benefit of the private scope of transnationals. But the implications of this dismantling process need to be clearly understood:

- On the one hand, of course, it is aimed at releasing all those who work with capital from the rules which social struggles have achieved little by little over the years;

- But another implication is that if the dismantling process is allowed to go ahead, in the future the democratic rights of citizens will be exercised in a total void. My elected representatives will be bereft of power and therefore my vote will become useless the day decisions of great import for the world's future are taken by the presidents of General Motors, Nestlé or Microsoft.

17. There are fields of human activity which for centuries have come under the sovereignty of the State. They include the army, justice, the police - including the residence of foreigners on the national territory - and currency. Over time, and also as a result of the struggles waged in individual countries, matters relating to the economy and to social organization have been added. These fields of sovereignty are the preserve of the "public authorities", an expression which has taken on and, it is hoped, will always retain a strong significance.

18. Under the terms of a growing number of international agreements, some of these public powers have been either delegated or transferred. Through intergovernmental treaties, some of the powers have been delegated to supranational, so called "public-law" bodies, which can then exercise the related prerogatives. In all these public institutions, whether they are national or

international, power is exercised through the more or less faithful, more or less democratic "representation" of citizens or States, the latter being themselves supposed to represent their citizens democratically.

19. Representative public bodies will then exercise their prerogatives either directly or in conjunction with other representative public bodies. One example is the United Nations Organization and the agreements concluded within that Organization; other examples include various regional institutions:

- These include agreements between States regulating the terms on which these prerogatives are exercised for the benefit (at least in theory) of private citizens; this would be the case, for instance, of the Universal Declaration of Human Rights of 1948 and the two United Nations Covenants of 1966, one on civil and political rights and the other on economic, social and cultural rights;

- Transfers may also be made to organizations which themselves hold authority; these may be specialized bodies in which governments do not merge but with which they cooperate to exercise their prerogatives of public authority, such as UNESCO, FAO or - according to a more complex operating system - the International Labour Organization (ILO), or supra-governmental organizations, such as the European Union. Thus, whether it is on a national level or an international level, a kind of "classic" model has been instituted to govern relations between private individuals and the public authorities.

20. This model has recently undergone substantial changes, however. In particular, it is now being exposed to strong attacks by transnationals, to which the States' response has been to say the least extremely ambiguous. The aim of the transnationals is to arrive at a situation where full liberalism applies, one where the States gradually relinquish all their powers of intervention in areas they consider important (such as public services, social rights, health, culture, and of course the environment). And many of the treaties currently being negotiated have the effect, as we have seen, of depriving States of their prerogatives.

21. The problem is that many States, either without thinking, or out of more or less tacit complicity with the transnationals, consent to this loss of sovereignty (and in this case the loss affects more the sovereignty of peoples than the sovereignty of States).

22. In order to dismantle State regulations, aided and abetted in many cases by the States themselves, the transnationals do not hesitate to engage in bargaining (what direct or indirect subsidies will you give me if I come and create jobs in your country?) or even blackmail (I have created jobs in your country, but if you will not allow me to bypass social regulations, I shall close my factory and move shop to a more "liberal" country).

23. This is why the States, under tremendous pressure by transnational enterprises, try to promote international agreements which liberalize money circulation and investment and open up frontiers to capital, all to the detriment of the sovereignty and rights of peoples.

## III. THE UNITED NATIONS BODIES AND THEIR ROLE

24. According to its own statutes, the WTO may entertain relations with other organizations "that have responsibilities related to those of the WTO" or "concerned with matters related to those of the WTO". In other words, organizations with responsibilities other than trade (in such uninteresting areas, for instance, as human rights) are not concerned and the WTO is not expected to cooperate with them!

25. What appears much more serious, however, is this: there are a number of texts and documents within the United Nations system, ranging from the International Covenant on Economic, Social and Cultural Rights and the Charter of Economic Rights and Duties of States to texts on the environment. But the WTO's claim to be completely detached from the United Nations Organization is really intended simply to escape from protective rules, which were paradoxically adopted by the Community of States within the framework of the United Nations.

26. Something altogether new and extremely serious is happening: whereas according to its Charter and the Universal Declaration, the United Nations must strive to develop the rules that govern our world, a competing power is being set up with the contrary aim of undoing whatever progress is achieved in the United Nations.

27. After 1945, a very strong desire for independence emerged in many States which had been colonized or were under the domination of foreign powers. That was followed by a great upheaval in the system of relations between States, when a considerable number of these gained independence. By the 1960s, the newly independent States decided they wanted to play a full part in the international community. Their influence in the United Nations itself then made itself felt and the Organization became partly dominated (in conformity with its statutes, in fact) by the General Assembly, where all the States were represented, and not as today only by the Security Council (or by its five permanent members or by just one of them).

28. The scope of intergovernmental and supra-governmental bodies was extended as a result of factors such as the emergence within States of a growing wish on the part of citizens to enjoy better economic and social conditions as well as access to the whole range of culture, the corresponding extension of the role of States in these areas, the new willingness of States to deal with all these matters, and the increased role of the newly independent States in international organizations (backed by the relative but real bond between most of these States within the "third world" movement).

29. At the same time, a number of countries as well as the United Nations bodies adopted a more democratic position. On 14 August 1998, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities appealed to the Office of the High Commissioner for Human Rights to consider the human rights implications of financial and investment policies, agreements and practices. The Sub-Commission on the Promotion and Protection of Human Rights appointed two rapporteurs on the issue of globalization and its impact on the full enjoyment of all human rights. The preliminary report they submitted (E/CN.4/Sub.2/2000/13) found that some United Nations bodies had been kept out of the debate

on globalization, particularly by the WTO. One such body was UNCTAD, which had been critical of the policies of the Bretton Woods institutions (it may even be wondered whether it was not because of its critical attitude that UNCTAD was deliberately left to one side).

30. This means that the United Nations bodies should very seriously consider to what extent the WTO, the member States of the WTO and the Bretton Woods institutions have been trying to move as far away as possible from the protective system created by the United Nations. To do this, the United Nations bodies undoubtedly need the support of citizens and NGOs, which is probably one of the main reasons why the Committee on Economic, Social and Cultural Rights organized a major meeting one year before the present one (6 May 2000).

## IV. THE CITIZENS

31. It may be remembered that an astonishing combined effort worldwide succeeded in halting the highly dangerous, liberticidal Multilateral Agreement on Investment (MAI) project. In democratic (or more or less democratic) States, citizens at least have a chance to influence their own future through their votes, their acts, their associations, their trade unions and their political parties. And they are now clearly determined, all over the world, to have their own sovereignty respected, which generally means having the sovereignty of their State (or regional group of States) respected. But the citizens realize that, although they can influence their own rulers, they have no grip on transnationals. This is why they cannot accept that their rulers should abandon their public authority prerogative for the benefit of transnationals, which are private groups.

32. Within these different types of bodies, the action of individuals, that is, the action of citizens, can find expression and can influence - or try to influence - the content of decisions. Just as trade union action within a Nation State can influence the decisions of that State's rulers, so action taken within one of the supranational bodies can affect the body itself. Even though it was a bitter experience, the example of joint trade union action in the European Union after the closure of the Vilevoord Renault factory shows how this type of action can work.

33. The heads of all these bodies, even though the way they are appointed may differ considerably from one institution to another, basically have two characteristics in common:

- They are appointed as the representatives of the citizens or of the public institutions concerned; and they are appointed more or less democratically, often in fact through the well-known process of bargaining between the various States concerned, but still chosen according to political criteria, that is, according to criteria reasonably related to public governance.

- Once they have been appointed, their task is to serve the institution they head to the best of their ability.

34. It is revealing, to take an example, that the whole of Europe considered that President Chirac had blundered when he said publicly that Mr. Jean-Claude Trichet would be well placed to defend France's interests as Governor of the European Bank. Practically

everybody saw it as a gaffe, since it is universally accepted that the Governor of the European Bank, whoever it may be and regardless of nationality, has the duty in office to defend the interests of the institution he or she governs (as to whether the interests of the institution coincide with those of European citizens is another, albeit very serious, matter).

35. Finally, the system described above is one where public authorities have duties to fulfil on behalf of their citizens, where they exercise prerogatives and where they agree - at least in part - on what prerogatives they should enjoy and under what conditions: whence the possibility for citizens, or for what is now referred to as "civil society", to make themselves heard loud and clear.

## CONCLUSION

36. One year ago, Mr. Yves Cochet, Vice-President of the French National Assembly, stated in a question to his Government that "legitimacy is on the side of the United Nations, but power is on the side of the WTO. In other words, there is a kind of watertight separation between international law and world trade". This comment reflects legitimate concern at an alarming trend: it is now up to the United Nations bodies, but also up to the Member States and to all citizens in the world to rectify the situation while it is still time. If economic and financial pressure groups want to press their claims, they must unhesitatingly be reminded of and must submit to the fundamental principle on which the whole community of States rests, namely that the protection and promotion of human rights must guide all international negotiations.

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